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No. 92-856

# In the Supreme Court of the United States

October Term, 1992

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JOSEPH J. PONTE,
SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTE at WALPOLE,
ET AL.,
Petitioners,

v.

DENNIS J. DOMEGAN,
Respondent.

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ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FIRST CIRCUIT

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## SUPPLEMENTAL BRIEF FOR PETITIONERS

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On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the First Circuit

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# Supplemental Brief for Petitioners

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The Petition for a Writ of Certiorari ("Petition") filed in this case presents the question of whether the First Circuit Court of Appeals erred in awarding attorney's fees pursuant to 42 U.S.C. § 1988 to a plaintiff whose only recovery was a nominal damage award of one dollar. In light of this Court's recent decision in Farrar v. Hobby, No. 91-990 (U.S. December 14, 1992), the answer to that question is plainly yes.

As in the instant case, the plaintiff in Farrar obtained a nominal damage award of one dollar. Id., slip op. at 3. While the Court held that Farrar was a "prevailing party" for purposes of 42 U.S.C. § 1988, Farrar, slip op. at 8, it concluded that he was not entitled to an award of attorney's

fees given his minimal success on the merits of his claims. Id. at 12.

In so ruling, the Court noted that:

> In some circumstances, even a plaintiff who formally "prevails" under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party. . . . When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, . . . the only reasonable fee is usually no fee at all.

Id. at 11 (citation omitted).

The present case is one of the "usual" cases described in Farrar, where only nominal damages are awarded, and the only reasonable attorney's fee is no fee at all. Indeed, Domegan's "victory" in this case was no more significant

than Farrar's. While Farrar received a judgment against just one of six defendants, id., (O'Connor, J., concurring), slip op. at 7, Domegan obtained his one dollar judgment against only three of ten defendants. Appendix ("App.") 8a-9a.[1/] And while Farrar set his sights higher than Domegan (asking for 17 million dollars in damages, Farrar, slip op. at 2), Domegan's one dollar recovery similarly pales by comparison to the $350,000 he sought. App. 7a-8a.[2/]

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1/ Three additional defendants were named in earlier complaints but were dropped from the final amended complaint. App. 8a n.3.

2/ The amount sought was composed of $50,000 in requested compensatory damages and $30,000 in requested punitive damages from each of the ten defendants. App. 7a-8a.

Additionally, the present litigation failed to serve any public purpose that might have justified an award of fees independent from the amount of Domegan's recovery. See Farrar, (O'Connor, J., concurring), slip op. at 7. As pointed out in the Petition, Domegan did not represent a class in this case, but represented only himself. Petition at 14-15. More importantly, the Department of Correction's policy that was at issue in this case had been completely changed long before the litigation was resolved (Petition at 15)[3/] and Domegan had been

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3/ Domegan has never claimed that the changes were occasioned by his lawsuit. App. 46a n.15.

released from custody (Petition at 14) by the time his claim for damages went to the jury. Therefore, as tried, Domegan's case, like Farrar's, was nothing more than an attempt to recover damages for alleged past injuries.

In light of this Court's decision in Farrar, while Domegan was a prevailing party for purposes of 42 U.S.C. § 1988,[4/] the only reasonable

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4/ Like both the petitioners and the Fifth Circuit in Farrar (id., (White, J., dissenting), slip op. at 2), the petitioners in this case only argued in their Petition that the "technical" or "de minimus" nature of Domegan's recovery deprived him of prevailing party status. They did not argue that even if Domegan was a prevailing party, the only reasonable fee in the circumstances of this case is no fee at all. Nonetheless, in noting in her concurring opinion that the position of

(footnote continued)

attorney's fee is no fee at all, and therefore, the Court should grant a Writ of Certiorari and summarily reverse the decision of the First Circuit awarding Domegan attorney's fees. Alternatively, the Court should grant a Writ of Certiorari, summarily vacate the First Circuit's judgment, and remand the case for further consideration in light of this Court's decision in Farrar.

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(footnote continued)

the petitioners here is supported by the language of this Court's opinion in Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, 792 (1989), Justice O'Connor stated that "even if the exclusion's location is debatable, its effect is not: When the plaintiff's success is purely technical or de minimus, no fees can be awarded." Farrar, (O'Connor, J., concurring), slip op. at 2. Therefore, the Court should similarly conclude in this case that the appropriate fee award is no fee, and enter judgment accordingly.

Respectfully submitted,

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